BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

COMMENTS OF

THE DIRECT SELLING ASSOCIATION

ON THE

NOTICE OF PROPOSED RULEMAKING IMPLEMENTING THE

TELEPHONE CONSUMER PROTECTION ACT OF 1991

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I. Introduction\General Background

Given the broad scope of the Telephone Consumer Protection Act (TCPA) and the implementation of the rule that seeks to balance the divergent interests of the small and large businesses using the telephone, individual rights and commercial free speech considerations, the Federal Communications Commission is to be commended for its reasoned approach in the past to this complex subject. The current regulations have many effective and efficient features for protecting the consumer, such as time of day restrictions. The Direct Selling Association (DSA) is pleased to have this opportunity to comment on whether changes are needed to the Federal Communications Commission's ("the Commission" or "the FCC") rules implementing the Telephone Consumer Protection Act of 1991 (TCPA). DSA participated in earlier Commission discussions regarding this and related rulemakings.[1]

By way of background, DSA is the national trade association representing companies that sell their products and services by personal presentation and demonstration, primarily in the home. These direct selling companies, with almost 12.2 million individual American direct sellers, include some of the nation's most well known commercial names, such as Alticor, Inc. (formerly Amway), Avon Products, Inc., Mary Kay Inc., and Shaklee Corporation. The home party and person-to-person sales methods used by our companies and their independent contractor sales forces have become an integral part of the American economy. Our industry represents over $26 billion in domestic sales and over $83 billion in worldwide sales. The 12.2 million individual direct sellers who sell for direct selling companies are independent contractors; they frequently sell on a part-time basis to their neighbors, relatives and friends as a means of supplementing other income sources. Their direct selling activities are generally neither extensive nor sophisticated.

We understand that the intent of the underlying legal authority is to regulate unsolicited telemarketing using the telephone. In enacting the TCPA, Congress directed the Commission to compare and evaluate alternative methods and procedures for protecting subscribers' privacy rights and evaluate which entities would have the capacity to establish and administer such methods and procedures. Additionally the Commission was directed to consider whether different methods and procedures should apply to small businesses like direct sellers.

Direct selling is the quintessential small business made up of millions of micro-entrepreneurs. It is a well-established method for marketing products to consumers directly, primarily in their homes and away from fixed retail locations. Companies within the industry market a broad range of consumer products and services, including household cleaning products, cosmetics and other personal care products, jewelry, cookware and other house wares, educational materials, household decorative products such as baskets, home improvement products, food, and vitamins.

In the great bulk of cases, direct selling serves as a supplement to family income, with the main household income source coming from full-time employment of the direct seller, his or her spouse, or both. For 60 percent of salespeople, direct selling activities provide less than 10

[1] See, e.g., Comments of the Direct Selling Association on the Notice of Proposed Rulemaking, CC Docket No. 92-90, May 26, 1992

percent of household income. For 72 percent of direct salespeople, direct selling produces less than 20 percent of family income. Overall, 90 percent of direct sellers earn less than $5000 per year in their direct selling businesses.

Direct selling offers a broad opportunity for these individual entrepreneurs. There are virtually no barriers to entry into direct selling-precisely because of their status as independent contractors. It is a field open to anyone. There are no demands that direct salespeople spend a given number of hours or adhere to any sort of work schedule. Equally, there are virtually no limits on the manner in which direct sellers can operate their businesses: any limitations that may exist are driven by legal restrictions, which can severely limit the ability of our micro-entrepreneurs to earn a profit.

Consequently, we believe that any changes to the Rule should respect the occasional and/or incidental telephone activities of direct sellers so as not to unduly burden their ability to operate the 12.2 million small businesses in our industry.

Direct sellers are *not* telemarketers. In short, there are a variety of legitimate, occasional, non-obtrusive uses of the telephone by direct sellers that could be negatively affected by any changes to exiting regulations. Direct sellers primary market products through *personal, face-to-face,* contact with their customers.[2] Nonetheless, they do occasionally use the phone for a variety of reasons related to their businesses, but not to make sales. Typically, if a direct seller uses the telephone in connection with the operation of her business, she will use a residential telephone line in the home to call people she knows or with whom she has a mutually established relationship. On occasion, a direct seller will be referred by a current customer to a prospective customer and will contact that person by telephone to set up an appointment. Additionally, a hostess of a direct selling party might use the telephone to invite potential guests. These legitimate, occasional, incidental and harmless uses of the telephone by direct sellers are not the telemarketing practices so often cited by consumers as problems.[3]

II. National Do-Not-Call Database

In adopting the initial rules to implement the TCPA, the Commission decided against a national do-not-call database for telephone subscribers that do not wish to receive telemarketing calls.[4] The Commission noted that a national do-not-call database would be costly and difficult to maintain.[5] The Commission selected the somewhat less onerous option of a company-specific do-not-call list that was intended to sufficiently balance the consumers' privacy interest while protecting the use of the telephone from unreasonable hindrance.[6]

The high cost of establishing and maintaining a national do-not-call database could have a chilling effect on the ability of direct sellers to earn a profit. The TCPA expressly prohibits

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[2] 26 U.S.C. § 3508(b)(2) (2001)

[3] See telemarketers referenced as "unknown organizations and "telemarketing firms" or "telemarketing companies," Jennifer H. Sauer, *Michigan Telemarketing Fraud and "Do Not Call" List: An AARP Survey*, April 2001; Joanne Blinette, *Minnesota Telemarketing Fraud and "Do Not Call" List: An AARP Survey*, December 2001; Katherina Bridges, *AARP New Jersey Telemarketing and "Do Not Call" List Survey*, January 2002

[4] *TCPA Order*, 7 FCC Rcd at 8760-61, paras. 14-15.

[5] *TCPA Order*, 7 FCC Rcd at 8758-61, paras. 11-15.

[6] *TCPA Order*, 7 FCC Rcd at 8763-67, paras, 20-24

charging subscribers for being listed in the national do-not-call database; accordingly, businesses making phone calls will likely be charged substantially for purchase, maintenance and upkeep of the list.[7] The business start-up costs for a direct seller will be drastically increased because they would be required to purchase a national do-not-call list. Indeed, as many direct sellers seek to earn just a few hundred dollars per year, the cost of obtaining a national list and then checking it would significantly diminish the attractiveness of direct selling as a viable income source. In Florida, where subscribers are also charged telemarketers annually pay $1,600 for electronic copies. Exempting direct sellers would, however, reduce our concerns in this regard.

DSA has always believed that because direct sellers are guests in our customers' homes, we should adhere to the highest standards of courtesy and business ethics. We support the desire of consumers to determine who will have access to their time and attention while they are in their homes.[8] Unfortunately, we believe that should direct sellers be required to consult a national do-not-call list before making the occasional or incidental telephone contact described above, consumers' choices will actually be limited, not enhanced.

Moreover, DSA believes, as we did in 1992, when the FCC first considered rules pursuant to the enactment of the TCPA, that a national do-not-call list will be an onerous and potentially damaging restriction on the ability of small businesses, like those of most direct sellers, to use the telephone[9]. We also believe that the practical feasibility of implementing such a list, and small business ability to easily comply with it, is highly questionable.

Similarly, DSA expects significant difficulties and costs should direct selling *companies* be made responsible for communicating the do-not-call list to individual, independent contractor direct sellers. Should direct selling companies be responsible for the reproduction of millions of copies of the registry for distribution, the administrative burden would be incalculable, given the turnover of salespeople within this industry. This burden is further compounded by the uncertainty presented with the task of updating the registry.

Finally, the Commission solicits comment on the interplay between existing state do-not-call lists, the proposed FTC do-not-call list and their proposed national registry. This interplay will likely be confusing for individual direct sellers who will be unsure of what exemption applies where; which lists to access; which customers are on which list, and a host of other potential conflicts. Moreover, direct sellers likely will be unsure of how many lists to purchase, increasing an already large potential barrier to their businesses. Such confusion could only add to the difficulties that would face direct sellers attempting to comply with this myriad of state and federal law and regulation.

[7] 47 U.S.C. § 227 (c)(3)(e)
[8] See Commission's Comments, 67 Fed. Reg. 4492 (2002) (to be codified at 16 C.F.R. § 310) (proposed January 30, 2002) p. 4495
[9] See, Direct Selling Association Comments on the Notice of Proposed Rulemaking Telephone Consumer Protection Act, May 26, 1992.

III. A National Do-Not-Call Database Should Not Apply to Direct Sellers' Occasional Use of the Telephone

We understand that the intent of the TCPA is to regulate unwanted telemarketing calls. Accordingly, DSA maintains that any regulation be have an explicit exemption for the exempt *occasional and incidental* uses of the telephone, like those engaged in by direct sellers. The FTC exempts these types of calls through the definition of telemarketing. In the FTC rule, isolated transactions do not constitute 'a plan, program, or campaign' and thus would not be subject to the Rule's provisions. We concur with the FTC's interpretation in this regard. **We suggest that the FCC explicitly identify an exemption for telephone calls where the solicitation is an isolated transaction and is not done in the course of pattern or repeated transactions of like nature. Such an exemption is entirely consistent with the statutory definition and existing law.**[10] Further, regulatory language could specifically define which activities would or would not constitute telemarketing for purposes of this regulation. DSA suggests that the activities described in Section II of these comments would not and should not constitute such a plan, program or campaign.

IV. A National Do-Not-Call Database Should Not Apply to Direct Sellers Who Complete A Sale at a Later Face-To-Face Meeting

The FTC currently explicitly exempts calls to schedule a later face-to-face meeting. 16 C.F.R. § 310.6(c). These types of calls are not telemarketing calls. They are simple telephone contacts intended only to schedule later face-to-face appointments.

Individual direct sellers might engage in such telephone contacts and thus be covered by a national do-not-call database without an exemption for such contacts. For example, a direct seller who markets cosmetics might arrange in home demonstrations of the product at semi-social gatherings of friends and potential customers. She might call a friend of a friend to gauge her interest in setting up a later sales party. That innocuous (and frequently welcome) contact could force individual direct sellers to check a do-not-call registry before arranging the home party. We believe such coverage to be inappropriate, unnecessary, and damaging to direct sellers.

An individual direct seller might be so daunted by the potential difficulties of accessing and checking the database, the cost of the list[11], and/or the possible penalties for inadvertent violation of the list provisions, she might forego making any use of the telephone, or forego the direct selling business altogether. Direct sellers, their customers, and the marketplace would be damaged. We believe this result to be counter to the intent of the TCPA.

Face-to-face sales presentations are already subject to significant, long-standing regulation that has largely eliminated or mitigated any potential practices that might violate any privacy

[10] Such an exemption already exists in many state laws. See, e.g., Ala. Code § 8-19-A-4 (1) (2000); 2000 Delaware Laws Ch. 262 (H.B. 135); Fla. Stat. Ann. § 501.604(1) (West 2000); Idaho Code § 48-1005(1)(a) (2000); Miss. Code Ann. § 77-3-609 (a) (West 2000); N.C. Gen. Stat. § 66-260(11)(g) (2000); Ohio Rev. Code Ann. § 4719.01(B)(1) (Baldwin 2000); Wash. Rev. Code Ann. § 19.158.020(3)(a)(i) (West 2000).

[11] We observe that the practical requirements for small businesses trying to comply with the Rule are as yet unknown.

concerns.[12] DSA has long supported so-called "cooling-off" laws and regulations. Essentially the federal law and corresponding state laws allow a customer to cancel any sales transaction completed in a face-to-face manner, away from a fixed retail location, that exceeds $25 within three days. The enactment of these laws effectively ended the reportedly prevalent high-pressure sales tactics of certain door-to-door salespeople in the 1960's and 1970's. In any case, we believe telephone contacts made by direct sellers to arrange later face-to-face presentations should not be covered by the do-not-call registry.

Accordingly, DSA respectfully urges the FCC to consider adding an explicit face-to-face exemption to any proposed national do-not-call database requirement.[13]

V. A National Do-Not-Call Database Should Not Apply to Direct Sellers Who Make A Telephone Call to Anyone With Whom the Caller Has An Established Business Relationship

The TCPA statutorily provides an established business relationship exemption from the definition of "telephone solicitation. Such an exemption already exists in many state telemarketing laws. [14]

A direct seller might occasionally call individuals with whom they have an on-going commercial or personal relationship, or those with whom they had a previous commercial or personal relationship. We believe these calls to be reasonable, frequently welcome and *expected* by the consumer. Indeed, it is the personal relationship with a direct seller that makes direct selling so unique and valuable to the consumer. Were a direct seller to be effectively prohibited from servicing and communicating with her customers, the value that she delivers to the consumer would be significantly lessened. We believe that consumers who otherwise might asked to be placed on the do-not-call database, would expect and hope that the direct seller with whom they have developed a productive personal and/or commercial relationship would continue to contact them. These ongoing contacts, including those by telephone, add to the convenience and

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[12] See, Rule Concerning a Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429 (2002).

[13] We note with interest the comments of FTC Chairman Timothy J. Muris, who indicated in a speech to the National Association of Attorney's General on March 20, 2002 that the FTC was trying to learn from the experience of the states with regard to the do-not-call list. Examples of state laws which we believe should provide a model to the FTC in this regard include the following which exempt telephone contacts intended to arrange a later face-to-face meeting: Ala. Code § 8-19-A-4(3)(c) (2000); Ariz. Rev. Stat. Ann. § 44-1273(A)(3) (2000); Ark. Code Ann. § 4-99-103(C)(v) (Michie 2000); Cal. Bus. & Prof. Code § 17511.1(e)(9) (West 2000); Colo. Rev. Stat. Ann. § 6-1-302(h) (2000); Fla. Stat. Ann. § 501.604(3) (West 2000); Idaho Code § 48-1005(1)(c) (2000); Ky. Rev. Stat. § 367.46951(d)(15) (Baldwin 1999); La. Rev. Stat. Ann. § 45:822(B)(8) (West 2000); Miss. Code Ann. § 77-3-609 (b)(iii) (West 2000); Nev. Rev. Stat. § 599B.010 (11)(l) (2000); N.C. Gen. Stat. § 66-260(11)(q) (2000); Ohio Rev. Code Ann. § 4719.01(B)(3) (Baldwin 2000); Okla. Stat. Ann. tit. 15 § 775A.2(1)(h) (West 2000); Or. Rev. Stat. § 646.551(2)(i) (1999); Pa. Stat. Ann. tit. 73 § 2242 (2000); Tex. Bus. & Com. Code Ann. § 38.059 (2000); Wash. Rev. Code Ann. § 19.158.020(3)(d) (West 2000); W. Va. Code § 46A-6F-204 (1999).

[14] Ala. Code § 8-19-A-4(21) (2000); Ark. Code Ann. § 4-99-103(C)(iv) (Michie 2000); Cal. Bus. & Prof. Code § 17511.1(e)(8) (West 2000); Colo. Rev. Stat. Ann. § 6-1-302(t) (2000); Fla. Stat. Ann. § 501.604(21) (West 2000); Ga. Code Ann. § 46-5-27(b)(3)(B) (1999); Idaho Code § 48-1005(1)(b) (2000); La. Rev. Stat. Ann. § 45:822(B)(7) (West 2000); Md. Code Ann. Com. Law § 14-2202(2) (1999); Miss. Code Ann. § 77-3-609(r) (West 2000); Okla. Stat. Ann. tit. 15 § 775A.2(1)(r) (West 2000); Or. Rev. Stat. § 646.551(2)(h) (1999); Wash. Rev. Code Ann. § 19.158.020(3)(c) (West 2000).

sociability that so characterize direct selling. Any national do-not-call list should allow these business and personal contact without any consultation of a national do-not-call database. The do-not-call list should be clearly focused on telemarketers, not direct sellers and other small businesses that pride themselves in providing personal service to their customers.

The established business relationship language is currently part of the Federal Communications Commission's (FCC) Telephone Solicitation Rule.[15] By maintaining its application to any national do-not-call registry the FCC would provide small entrepreneurial businesses with additional regulatory comfort and predictability. The telemarketing laws of twelve other states currently exempt prior personal relationships.[16]

VI. Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

As requested pursuant to regulatory flexibility analysis, direct sellers are "small entities" under the Small Business Act.[17] The number of direct sellers potentially impacted by changes to the regulation would be 12.2 million individual small business owners.

VII. Summary

In summary, DSA respectfully asks the commission to consider the recommendations made within this document when crafting any changes to existing regulation. DSA has raised several concerns and suggestions:

- DSA believes, as we did in 1992 when the Federal Communications Commission first considered rules pursuant to the enactment of the Telephone Consumer Protection Act (TCPA) of 1991, that a national do-not-call list will be an onerous and potentially damaging restriction on the ability of small businesses, like those of most direct sellers, to use the telephone.

- DSA concurs with the FTC position that isolated telephone calls, like those of direct sellers, should not be covered by any national do-not-call database. DSA reiterates its suggestion that the FCC exempt telephone calls where the solicitation is an isolated transaction and not done in the course of pattern or repeated transactions of like nature. Such an exemption is entirely consistent with the statutory authority and existing law.

[15] 47 C.F.R. § 64.1200(c)(3) (2000).
[16] Ala. Code § 8-19-A-4(21) (2000); Ark. Code Ann. § 4-99-103(C)(iv) (Michie 2000); Cal. Bus. & Prof. Code § 17511.1(e)(8) (West 2000); Colo. Rev. Stat. Ann. § 6-1-302(t) (2000); Fla. Stat. Ann. § 501.604(21) (West 2000); Ga. Code Ann. § 46-5-27(b)(3)(B) (1999); Idaho Code § 48-1005(1)(b) (2000); La. Rev. Stat. Ann. § 45:822(B)(7) (West 2000); Md. Code Ann. Com. Law § 14-2202(2) (1999); Miss. Code Ann. § 77-3-609(r) (West 2000); Okla. Stat. Ann. tit. 15 § 775A.2(1)(r) (West 2000); Or. Rev. Stat. § 646.551(2)(h) (1999); Wash. Rev. Code Ann. § 19.158.020(3)(c) (West 2000).
[17] 5 U.S.C. § 601(6).

- The FCC should explicitly exempt telephone contacts that are followed by later face-to-face meetings, where the sale actually takes place. The FTC currently has a face-to-face exemption within the Telemarketing Sales Rule. We believe it unnecessary to subject telephone contacts made by direct sellers to arrange appointments to any requirements of any telemarketing Rule.

- We believe any telephone calls made to any person with whom the caller has an established or prior relationship should be exempt from any national do-not-call database as consistent with the TCPA and current regulation implementing it.

Effective laws and regulations are always narrowly tailored to address a specific harm. Overly broad laws and regulations create administrative problems for the public and private sector and dilute their own effectiveness. We ask the FCC to maximize the effectiveness and efficiency of the TCPA by tailoring it to regulate the elements creating the harm and not overburdening business in a time of economic recovery. The Direct Selling Association appreciates the opportunity to express our views.